Supreme Court, U.S.
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No. 98-1862

In The

Supreme Court of the United States

RICHARD L. GORDON,

Petitioner,

v.

COMMUNITY FIRST BANK OF NEBRASKA (formerly THE ABBOTT BANK), RICHARD J. CHAPIN, DARRELL RAUM, PAT KESLAR, TOM WILLNERD, JAMES A. HANSEN, LUCINDA GLEN and KENT PLUMMER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nebraska

BRIEF OF RICHARD J. CHAPIN, DARRELL RAUM, PAT KESLAR AND TOM WILLNERD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's Fourth Amended Petition alleged the violation of any constitutionally protected right where it alleged merely that he, as an attorney, lost his job with his law firm and his ability to practice law for a specific client.

2. Whether the issuance of emergency orders authorized by federal and state banking laws can constitute "abusive, arbitrary and oppressive" conduct for the purposes of a claim pursuant to 42 U.S.C. § 1983.

3. Whether the issuance of such emergency orders, which merely prohibit a person from acting unlawfully and do not command the termination of one's employment, cause a loss of employment for the purposes of a claim pursuant to 42 U.S.C. § 1983.

ARGUMENT

This Brief in Opposition is submitted on behalf of Respondents Richard J. Chapin, Darrell Raum, Pat Keslar and Tom Willnerd (the "Individual Respondents"). The Individual Respondents are individuals, are not state actors, and are various officers of the Community First Bank of Nebraska (the "Bank"). For the following reasons, the Petitioner's Petition for Writ of Certiorari should be denied.

The Petitioner alleges that he suffered a violation of his constitutionally protected rights when, as a result of certain emergency orders issued by the Nebraska Department of Banking acting pursuant to federal and state banking law, the Petitioner's law firm (McGrath, North, Mullen & Kratz) lost its attorney-client relationship with the Bank and the Petitioner, as a result, lost his position with the firm. (Pet. App. 43). These allegations, along with other State law tort claims, were made in Petitioner's Fourth Amended Petition filed against the Individual Respondents and others.

The Individual Respondents demurred to Petitioner's Fourth Amended Petition. In Nebraska, in ruling on a demurrer, the Court considers as true only factual allegations of a pleading, not the pleader's conclusions. Neb. Rev. Stat. §§ 25-806-810; *Widga v. Sandell*, 236 Neb. 798, 464 N.W.2d 155, 157 (1991). The Individual Respondents' demurrer was sustained.

On Petitioner's subsequent appeal to the Nebraska Supreme Court, the Nebraska Supreme Court appropriately recognized that in his Fourth Amended Petition:

> [T]he only factual allegations pertaining to conduct directed at [Petitioner] by the [Individual Respondents] and the state regulators are (1) the issuance of an emergency order by the Department [of Banking] requiring [Petitioner] to cease and desist from "managing, controlling, directing or otherwise interfering with any aspect of the ongoing business" of the Bank and (2) the subsequent termination of the attorney-

> client relationship between the Bank and [Petitioner's] law firm, as a result of which [Petitioner] alleges to have "lost his position" with the firm.

(Pet. App. 24; *Gordon v. Community First State Bank*, 255 Neb. 637, 653; 587 N.W.2d 343, 354 (1998). Thus, the Petitioner alleges that his rights to practice law for a particular client and for a particular law firm are Constitutionally protected, and that depriving him of those rights states a claim pursuant to 42 U.S.C. § 1983.

In support of his claim, Petitioner relies on *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, this Court stated that although loss of reputation alone does not constitute a liberty or property interest protected by the Fourteenth Amendment, a § 1983 claim will lie if the claimant can show loss of reputation plus the loss of a "more tangible interest, such as employment." *Paul* at 701. While this statement alone, taken out of context, appears to support Petitioner's claim, *Paul*'s holding does not.

It is well established that in order to state a claim under 42 U.S.C. § 1983, a claimant must allege the deprivation of some right which has been guaranteed by the Constitution. *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). Accordingly, after discussing numerous other of this Court's holdings including many cited by the Petitioner herein, *Paul* ultimately held:

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment.

Paul at 711.

Among the rights which have been so recognized is the right of all citizens to work for a living and this Court and many others have recognized that all citizens have a liberty interest in pursuing the occupations of their choosing. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Likewise, an

attorney has a right to practice law and cannot be deprived of that right without due process. *See Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957). The Petitioner, however, did not allege any facts showing that he could not practice law, or that he could not, after losing his job with one law firm, obtain a job at another. The Petitioner's allegation is that he has a constitutionally protected right to work for a *specific client* and at a *specific firm*, which claim is quite different than the recognized right to pursue a chosen occupation, or to practice law.

Although his Petition cites a string of cases allegedly supporting the rights he claims, the Petitioner cites no authority, and we have found none, recognizing the right of an attorney to work for a specific law firm or to do legal work for a specific client. In fact, each of the cases cited by the Petitioner involved the general loss of a claimant's employability or occupational status as a result of some governmental stigma or defamation. This is much different than allegations relating to the loss of an isolated job or a single client.

Based on the foregoing, the Nebraska Supreme Court, in affirming the lower court's dismissal of the Petitioner's § 1983 claim, appropriately recognized:

> We are aware of no authority recognizing a constitutionally protected right of a lawyer to represent a particular client or work for a particular law firm. Such relationships among private parties and entities are usually terminable at will or governed by contract.

(Pet. App. at 24-25); *Gordon* at 654, 587 N.W.2d at 354.

Because the Petitioner has not appropriately alleged the violation of any constitutionally protected right, the Nebraska Supreme Court's decision was correct, and Petitioner's Petition for Writ of Certiorari should be denied.

In addition to the foregoing, in order to state a claim pursuant to 42 U.S.C. § 1983, it is generally recognized that the Fourteenth Amendment Due Process Clause, like its Fifth Amendment counterpart, requires a showing of abusive, arbitrary or oppressive governmental conduct. *DeShaney v. Winnebago*, 489 U.S. 189, 196 (1989). Stated differently, in *Myers*

v. Scott, 868 F.2d 1017, 1019 (8th Cir. 1989), the Eighth Circuit Court of Appeals held "the theory of substantive due process is properly reserved for truly egregious and extraordinary cases." Thus, many harms, though allegedly caused by a state actor, do not fall within the scope of a § 1983 civil rights claim, for § 1983 does not convert the Fourteenth Amendment into a font of tort law that supercedes the tort systems already available under individual state laws. *Gregory v. City of Rogers, Arkansas*, 974 F.2d 1006, 1009 (8th Cir. 1992). The foregoing was also recognized in *Paul*, in which this Court paused to consider the ramifications of adopting the therein petitioner's broad and expansive application of § 1983 to the simple defamation claim which he actually stated. *Paul* refused to so expand § 1983 claims to cover those claims already covered by state law. *Paul* at 698.

Similarly in this case, in a federal lawsuit filed by the Petitioner arising from identical facts but filed against different defendants, the Eighth Circuit, in affirming the United States District Court for the District of Nebraska's dismissal of Petitioner's claims, held:

> The . . . issuance of the emergency orders which, in part, mandated that the Bank, its officers, directors and employees cease and desist from allowing [Petitioner] to act as an unlicensed executive officer, and [the] continued joint investigation of the Bank after discovering that the Bank was not in immediate danger of financial collapse do not constitute "abusive, arbitrary or oppressive government conduct." . . . [The] investigation was authorized by applicable federal and state law and was proper because an agency 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'

Gordon v. Hansen, 168 F.3d 1109, 1113 (8th Cir. 1999).

In the present case, the Petitioner, in addition to his § 1983 claim, made a state law abuse of process claim (Pet. App. 41), and chose not to allege other state law claims based upon theories of defamation, malicious prosecution or other related theories. 42 U.S.C. § 1983, however, was never intended to

transform these simple state law claims into federal claims for deprivation of Constitutional rights. The Petitioner cannot state a § 1983 claim without alleging conduct more outrageous than simple state law torts.

Finally, to state a claim under 42 U.S.C. § 1983, the Petitioner must plead a causal relationship between the alleged governmental action and his alleged injury. *See Latimore v. Widseth*, 7 F.3d 709, 716 (8th Cir. 1993). Even assuming the truth of Petitioner's allegation that the Individual Respondents and agents of the Nebraska Department of Banking conspired to issue the emergency orders, neither those orders nor any other action of the Individual Respondents commanded Petitioner's termination from his law firm. Rather, the orders merely prohibited the Petitioner from acting as an unlicensed executive officer of the Bank, which he had no legal right to do in the first place. Hence, the Petitioner has pled no causal connection between the conduct of the Individual Respondents and the Petitioner's alleged injury, and he has not, therefore, stated a claim pursuant to 42 U.S.C. § 1983. *See Gordon v. Hansen*, 168 F.3d 1109 (8th Cir. 1999).

CONCLUSION

For each of the foregoing reasons, the Nebraska Supreme Court's decision was appropriate and Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD J. CHAPIN, DARRELL RAUM, PAT KESLAR and TOM WILLNERD, Respondents

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